Supreme Court, U.S.
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No. 08-272

IN THE

Supreme Court of the United States

JAMES WAYBRIGHT, as personal representative and co-executor of the estate of Andrew Waybright (deceased); and SHIRLEY WAYBRIGHT, individually and as personal representative and co-executor of the estate of Andrew Waybright (deceased),

Petitioners,

v.

FREDERICK COUNTY, MARYLAND, DEPARTMENT OF FIRE & RESCUE SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

The Fourth and D.C. Circuits (unlike the Third, Sixth and Tenth Circuits) have wrongly applied *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) so as to limit the use of the deliberate indifference test to custodial circumstances alone. The conflict among these circuits is stark and should be resolved by this Court. Respondents have not, and cannot, argue their way around this fundamental truth.

II. THE CONFLICT BETWEEN THE CIRCUITS IS UNDENIABLE.

A. Third Circuit

Respondents fail to appreciate the significance of the Third Circuit's jurisprudence on the standard of culpability. Following *Lewis*, the Third Circuit "had occasion to reflect on the appropriate standard of fault in a number of different settings" described in its decisions. *Sanford v. Stiles*, 456 F.3d 298, 306 (3d Cir. 2006) "Sometimes, an intent to cause harm has been required; other times, deliberate indifference has been sufficient." *Id.*

In *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999) (a non-custodial case involving a social worker acting to separate a parent and child), the Third Circuit "utilized a standard part way between intent to harm and deliberate indifference." *Sanford*, 456 F.3d at 306, citing *Miller*, 174 F.3d at 374-75. The *Miller* court

established three possible standards to determine whether behavior rose to the level of conscience-shocking: deliberate indifference; gross negligence or arbitrariness that "indeed shocks the conscience"; and intent to cause harm. *Miller*, 174 F.3d at 375-76; *Sanford*, 456 F.3d at 306.

Following its decision in *Miller*, the Third Circuit decided *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 58-59 (3d Cir. 2002) (Alito, J.). There, a plaintiff brought a substantive due process claim against two paramedics, asserting that their careless actions in lifting him rendered him a quadriplegic. *Id.* at 60. *Ziccardi* "created a new articulation for the mid-level standard first discussed in *Miller*." *Sanford*, 456 F.3d at 308 n8.

Ziccardi "determined that the language in *Miller* — 'gross negligence or arbitrariness that indeed shocks the conscience' — was not intended as a 'precise articulation.'" *Sanford*, 456 F.3d at 307, citing *Ziccardi*, 288 F.3d at 65. The Third Circuit "attempt[ed] to elucidate and apply the level of culpability required in *Miller* [and] noted that the case appeared to have demanded proof of something less than knowledge that the harm was practically certain but more than knowledge that there was a substantial risk that the harm would occur." *Sanford*, 456 F.3d at 307 (internal quotation marks omitted), citing *Ziccardi*, 288 F.3d at 66.

The court formulated a standard for circumstances where no instantaneous decision is necessary, but where the state actor also does not have the luxury of

proceeding in a deliberate fashion: "A plaintiff must show that the defendant consciously disregarded, not just a substantial risk, but a great risk that serious harm would result." *Id.* (internal quotation marks omitted).[1]

Miller and *Ziccardi* are extremely important because they reflect the Third Circuit's application of the deliberate indifference (and similar) standards in noncustodial circumstances. The instant case reflects the Fourth Circuit's steadfast refusal to do likewise.[2] The

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1. The Petition cites *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 1999) to illustrate the apparent use of the deliberate indifference standard in a state-created danger substantive due process claim. In *Sanford*, the Third Circuit discussed its decision in *Rivas*:

> We did not explicitly adopt the *Ziccardi* standard in *Rivas*. In fact, it is not altogether clear which standard was applied. For example, at one point after discussing *Ziccardi*, the opinion refers to the only proper test as whether the technicians consciously disregarded 'a substantial risk.' *Rivas*, 365 F.3d at 196. That would indicate use of the deliberate indifference standard. However, given that the opinion speaks deferentially of *Ziccardi*, and that the culpability question is later summarized in terms of a 'great risk of harm,' *id.* at 196, we believe that *Ziccardi* was probably meant to apply.

456 F.3d at 308 n.9

2. Respondents coyly avoid acknowledging the import of these cases by lapsing into literalism: "*Ziccardi* and *Miller* did not involve *application* of a 'deliberate indifference' standard." Br. of Resp'ts at 31 (emphasis supplied).

D.C. Circuit's[3] position is identical to the Fourth's. The conflict on this important issue between the Third Circuit (as well as the Sixth and Tenth Circuits discussed below) on the one hand, and the D.C. and Fourth Circuits on the other, is thus pellucidly clear.

B. Sixth Circuit

Respondents also do not grasp the significance of the key Sixth Circuit case in this area: *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002). There, the court applied the deliberate indifference test in a police standoff situation. The Sixth Circuit had this to say about the application of the deliberate indifference test in noncustodial circumstances:

> We note that although the issue has never been decided, cases from this circuit decided before *Lewis* have expressed doubt as to whether the deliberate indifference standard should apply in noncustodial settings. *Such doubt, we believe, has been resolved by the Court's opinion in Lewis, which made clear that the key variable is whether actual deliberation is practical, not whether the claimant was in state custody.* As the Court explained, deliberate indifference applies in custodial settings because these settings provide the opportunity for reflection and unhurried judgments. *Lewis*, 523 U.S. at 853, 118 S.Ct. at 1708 (emphasis supplied).

Id. at 512 n.5 (citation and quotation marks omitted).

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3. *See Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1146 (D.C. Cir. 2004).

The Sixth Circuit's opinion patently conflicts with the Fourth Circuit's holding in the instant case. It cannot be gainsaid that there is a deep and clear conflict between these circuits, as there is between the Third Circuit, siding with the Sixth, and the D.C. Circuit, siding with the Fourth.

C. Tenth Circuit

In *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998) the Tenth Circuit considered a § 1983 action brought against a deputy sheriff by the estate of a bystander who had been instructed by the deputy to assist him in subduing a suspect. During a struggle for possession of the deputy's gun, the bystander was fatally shot after the suspect gained possession of the weapon.

The plaintiff proceeded on a state-created danger theory which requires proof of deliberate indifference. The Tenth Circuit considered the bounds of the deliberate indifference standard and plainly did *not* limit its application to custodial circumstances:[4]

> In assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency

4. Respondents aver that the Tenth Circuit in *Radecki* "never adopted the deliberate indifference standard." Br. of Resp'ts at 33. Respondents ignore the unambiguous intention of the court going forward *vis-à-vis* the alleged custodial requirement.

> situations. In the many cases that involve 'lawless behavior for which the police were not to blame,' *id.*, we are no longer obliged to try to give meaning to the word "arbitrary" as the district court tried to do.
>
> Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

Id. at 1231-32.

D. *Marvel v. Delaware County*

Respondents try to recast the facts of the recently decided *Marvel v. Delaware County*, 2008 WL 1700536 (E.D. Pa. Apr. 10, 2008) to demonstrate that the case is really one involving a custodial situation. Respondents assert that the district court denied the motion to dismiss *Marvel* because the case "involved a limitation on the freedom of the decedent to act on his own behalf." Br. of Resp'ts at 29. There is simply nothing in *Marvel*

that justifies Respondents' assertion. Indeed, Respondents avoid telling the Court that the *Marvel* defendants did *not* treat the case as one involving custody:

> Defendants argue that [the] County Defendants did not appear at Mr. Marvel's home on the morning of August 1st, take him into custody and 'force' him to do anything. Presumably, had David Marvel gotten up on the morning of August 1st and advised the community service coordinators that he was ill or that in his opinion it was too hot for him to work, there would have been little or nothing the County Defendants could have done about it except to advise that he would have to make up the time on another day.

Id. at *6 (internal quotation marks omitted)

Respondents misstate the holding in *Marvel* and the facts that underlie the decision because *Marvel is* this case — and a basis for asserting that the instant case would be viable if it had been brought in Pennsylvania rather than Maryland.[5] The ultimate irony here is that Petitioners and their late son were residents of Pennsylvania at the time of his death.

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5. Petitioners rely on *Marvel* primarily for this reason and not only because (as Respondents suggest) it "evidenc[es] a conflict 'between the circuits." Br. for Resp'ts at 28.

III. THE RESPONDENTS MISREAD THE PRECEDENTS OF THIS AND OTHER COURTS.

Respondents (like the circuit court) cleave to *Collins* as dispositive of this case. What Respondents fail to appreciate is the difference between the negligent act in *Collins* (breach of duty to provide a safe workplace) versus the conscious, reckless act in this case (Coombe's decision to deprive the recruits of water) and in *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998) (shooting of a police officer by a fellow police officer).

The Court put it this way in *Lewis*: "Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls." 523 U.S. at 833 (internal citation and quotation marks omitted).[6]

Moreover, unlike *Collins* (where the state was passive), in the instant case it was the state actor who directly caused the injuries of another state actor. This is an important distinction between *Collins* and the instant case which the Fourth Circuit failed to appreciate.

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6. *See also Central of Georgia Ry. Co. v. Graham*, 220 Ala. 645, 127 So. 213, 216 (1930) ("[I]n the defining of wantonness, there must be a conscious act *or a conscious failure to act*, with a knowledge that injury will probably result, and with a reckless disregard of consequences" (emphasis supplied).

Respondents devote several pages to Petitioners' reliance on *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998). Respondents misstate the key facts of *Jensen* and misapprehend its importance in illustrating the fundamental differences between *Collins* and this case.

In *Jensen*, the widow of police officer Jensen brought a § 1983 action against the city, police chief, police sergeant and others, alleging that the officer's Fourth and Fourteenth Amendment rights were violated when, in the line of duty, he was shot and killed by a fellow officer (Sergeant Christian) who mistook him for an armed criminal. The Eighth Circuit (affirming the district court's denial of a motion to dismiss) held, *inter alia*, "that Sergeant Christian, by intentionally shooting at a figure he mistook to be an armed criminal, engaged in a Fourth Amendment seizure." *Id.* at 1084. The circuit court also found that "if the [defendant] police officials knew Sergeant Christian was likely to inflict a constitutional injury or if their practices and policies showed a '*deliberate indifference*' to the danger such an individual posed, they should be liable under § 1983." *Id.* at 1086-87 (emphasis supplied).

What is important here is the manner in which the Ninth Circuit court in *Jensen* distinguished the case from *Collins*:

> [T]his case is different in one significant way [from *Collins*] — the nature of the injury alleged." *Id.* at 1084. While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect

> government employees from non-state actors, *this* case involves the allegedly intentional or reckless acts of a government employee directed against another government employee.

Id. (footnote omitted, emphasis supplied.)

There is nothing in *Jensen* that suggests the latter overarching principle is in some way limited to Fifth Amendment work-place civil rights violations but not to Fourth Amendment claims (as Respondents appear to argue). Indeed, Mrs. Jensen (like the instant Petitioners) had an equally viable Fifth Amendment claim if she had chosen to assert it.

IV. RESPONDENTS MISSTATE THE EVIDENTIARY RECORD.

Respondents challenge few of the facts asserted by Petitioners and thereby concede their truth. When they do comment on the facts, Respondents misstate them or make affirmative concessions.

Respondents aver that "the Frederick County instructors, most[ly] came from the field, *i.e.*, from Frederick County fire stations where the instructors worked as firefighters." Br. for Resp'ts at 3. In reality, the instructors were officers in their respective firefighter battalions and, except one officer (who was not assigned to Mr. Waybright's recruit class), did not teach physical fitness and had no training in teaching physical fitness.

Respondents say that "[a]t no time were specific recruit classes to be held if the requisite amount of instructors per [the Maryland Fire and Rescue Institute (MFRI)] were not available [and] that as of 2002, MFRI did not offer a firefighter physical training class." *Id.* However, all of the record evidence points to the fact that the "requisite number of instructors" were *not* available to Respondent Coombe on the day that he trained and led Mr. Waybright to his death. Respondents later concede this: "[U]pon arriving at the Training Center on July 3, 2002, Respondent Coombe discovered that, despite his request for an additional instructor to follow the off-campus exercise, no such person was present." Br. for Resp'ts at 8. Moreover, the independent Board of Inquiry (whose members included several of the instant Respondents and MFRI officials), concluded that Respondents did not have the requisite number of instructors. It recommended (among many other things) that the Fire Department should not conduct another recruit class until it had budgeted and obtained funds for sufficient full-time staff and had hired and trained them, and that it must establish minimum staff levels for all physical training exercises.

Respondents claim that Mr. Waybright's recruit class was administered by Lt. Finnin.[7] Br. for Resp'ts at 4. The problem is that on the sweltering day of Mr. Waybright's intense physical exercise, Lt. Finnin had taken the day off, leaving the class in the hands of

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7. Lt. Finnin is not a party to this litigation.

Respondent Coombe, who not only lacked any formal training, but also (as Respondents admit) was unqualified to run such a class on his own. Moreover, the record reveals that "administering" a recruit class and running the physical training portion of a recruit class are wholly separate endeavors. Indeed, Lt. Finnin was among those officers who had warned the Fire Department's Chief months earlier that the recruits were in danger of injury because of the lack of instructors.

Respondents aver that "[b]efore the start of Class VI, each recruit that had been accepted into the recruit program received a letter . . . [which] directed them to begin acclimating themselves to the present summer weather conditions and to 'start hydrating.'" Br. for Resp'ts at 5. It is undisputed, however, that the letter was *not* received by the recruits until, at most, four days before the start of the training program. Even Respondents' expert admitted that this denied the recruits enough time to acclimate themselves to training in hot weather. The Board of Inquiry found that, "[w]ith the letter dated June 21, 2002, and the class starting July 1, 2002, there was little time to accomplish that task."

Respondents go on to say that the letter "also required the recruits to bring, among other things, 'a one-gallon (minimum) water container' to be carried with the recruits at all times for hydration during Recruit Class VI." Br. for Resp'ts at 5. What Respondents fail to tell the Court is that the recruits, before they embarked on their rigorous run, had to leave *all* of their water bottles at the training facility. It was

physically impossible for the recruits to run with the water jugs that they had been told to bring with them. Moreover, after leaving the facility, Respondent Coombe denied the recruits water during their arduous one-hour run in hot weather and no arrangements had been made to provide the recruits water after they left the facility and during or after the actual physical training.

Respondents say that "[t]he Department also had an outdoor weather policy prohibiting outdoor activities when the heat index reached 110 degrees Fahrenheit[,] . . . consistent with accepted fire service practice." Br. for Resp'ts at 7. Respondents avoid admitting that their one-page weather policy was, by all objective standards, completely inadequate. Indeed, following Mr. Waybright's death, Respondents adopted a policy that required suspension of all training activities when the heat index reached 86 degrees, well below the heat index at the time Mr. Waybright died. In its investigation, OSHA found, in part, that the recruits had been exposed to excessive heat and termed the actions of the Respondents "egregious" and "likely to cause death or serious physical harm." Neither Respondent Coombe nor anyone at the training facility monitored the temperature or heat index on the day that Mr. Waybright died.

Respondents' last resort is to cynicism. Respondents argue that "no reasonable jury could conclude that Respondent Coombe's conduct was deliberately indifferent." Br. of Resp'ts at 33. This argument is reverse alchemy.

Respondents here assume that their misconduct toward Mr. Waybright began when he hit the ground and became unconscious. The gravamen of the conduct under consideration, however, are a host of things that Respondent Coombe recklessly did, beginning with his decision to hold a training exercise on the day in question. *See* Pet. at 2-5.

Moreover, the district court never considered whether the evidence was sufficient to establish a deliberate indifference claim against Respondent Coombe. Rather, the district court analyzed the evidence with only custody in mind and, finding that Mr. Waybright was never in custody or forced by Respondent Coombe to engage in the training exercise that culminated in his death, found the evidence wanting. *See Waybright v. Frederick County Md. Dept. of Fire & Rescue Services*, 475 F. Supp. 2d 542, 552-53 (D. Md. 2007).

The Petition sets forth ample record evidence of Respondent Coombe's deliberate indifference for the well-being of Mr. Waybright.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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